IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-788

ESQUIRE, INC.,

Petitioner,

vs.

BARBARA A. RINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION.

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1. Respondent's statements as to the law as well as the decision below are diametrically opposed to the existing statutory copyright law and constitutional provision on which it is based.

The basic error in each is brought out by the quote of the lower court's decision in footnote 2, page 5 of Respondent's Memorandum.

> "But, as the court of appeals observed (Pet. App. A14-A15), *Mazer* does not answer the question presented in this case, which is whether petitioner's designs are separately identifiable works of art."

2. Directly contrary to this contention, this Honorable Court held in *Mazer* v. *Stein,* 347 U. S. 201 (1954) that as to identifying the sculptural expression embodied in a utilitarian article

> "Such expression, whether meticulously delineating the model or mental image or conveying the meaning by *modernistic form* or color, is copyrightable" 347 U. S. 214. (Emphasis ours.)

and

> "We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration" 347 U. S. 218.

3. Respondent does not deny that the sculptural form defined by petitioner's lamp housings, if used as the design of a piece of modern sculpture, would be registrable by respondent under 17 U. S. C. 102(a)(5) as a "sculptural work" *per se*.

4. As pointed out in Respondent's Memorandum (footnote 1, page 3), the new Copyright Act

> ". . . can be taken as an expression of congressional understanding of the scope of protection for utilitarian articles under the old regulations."

Such congressional understanding obviously would extend to section 113(a) of the Act,

> ". . ., the *exclusive right to reproduce a copyrighted . . . sculptural work* in copies under section 106 includes the right to reproduce the work in or *on any kind of article*, whether *useful or otherwise*." (Emphasis ours.)

5. A modernistic form sculpture registered as a work of art under 17 U. S. C. 105(a)(5) obviously incorporates "sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article", as required by 17 U. S. C. 101. It follows as night follows day that if the same modernistic form is used instead as the shape of an industrial article, the shape is still capable of being identified separately from and existing independently of the utilitarian aspects of the article. This is true whether the modern sculpture shape is first used as the shape of the sculpture or first used as the shape of the utilitarian article. The self-same shape

may obviously be identifiable as the *shape* of either, and obviously, if the modern sculpture shape of the sculpture is identifiable and capable of existing as a sculpture, the same shape, when first used as the shape of an independent article must be identified as the shape *per se* and capable of existing separately as such a separate piece of sculpture.[1]

6. This Honorable Court clearly held in *Mazer* that it makes no difference whether sculpture is registered first as sculpture *per se*, or as an element of a manufactured article, *i.e.*, as the housing of petitioner's lamp fixture.

> "Nor do we think the subsequent registration of a work of art published as an element in a manufactured article, is a misuse of the copyright. This is not different from the registration of a statuette and its later embodiment in an industrial article." 347 U. S. 218.

THE DECISION BELOW IS AGAINST THE NATIONAL INTEREST.

The decision below is an attempt by a lower court to overrule a prior Supreme Court decision, and if permitted to stand, will open the floodgates to pirating of modernistic sculptures, such as those of Brancusi, Arp, Moore, etc., by permitting unauthorized use of the recognized masterpieces of such sculptors as modernistic forms, or shapes, of industrial articles. It would appear that this was *not* the intent of this Honorable Court in the *Mazer* decision. Thus, the Court of Appeals decision, which is so obviously diametrically opposed to the clear holdings of *Mazer*, should be overruled.

A basic purpose of the copyright law, as mandated in the Constitution of the United States on which it is based, is to *promote science* and the *useful arts* by protecting creative writings of authors. This basic concept, rooted in the paternal

1. "The manufactured article is the *joint product* of the *science* and the *practice* which is combined in the *handicraft*" (Plato, *Politicus*). (Emphasis ours.)

Statute of Monopolies of 1623, is negated by the lower court's decision herein.

The court has clearly held in *Mazer* that the modernistic form of an industrial article is such a writing equally as well as that same form used as sculpture *per se*.

It is respectfully submitted that this Honorable Court should grant the Petition for a Writ of Certiorari to correct the legal error of the court below so contrary to its own clear expressions in *Mazer* and so inimical to the national interest and petitioner's rights.

Respectfully submitted,

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